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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1497

WILLIAM SCOTT and RONALD KINDRED,
Appellants,

vs.

THE STATE OF CALIFORNIA,
Appellees.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four

JURISDICTIONAL STATEMENT

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Subject Index

	Page
Opinion below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
The questions are substantial	8

Table of Authorities Cited

Cases

	Pages
Rathbun v. United States (1957) 335 U.S. 197	9

Codes

California Evidence Code:	
Section 250	9
California Penal Code:	
Section 630	6
Section 632	3, 8, 10
18 U.S.C., Section 2511(d)	8
28 U.S.C., Section 1257(2)	2

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, entered on January 13, 1975, and the decision of the Supreme Court of the State of California denying a hearing in the within matter entered on March 12, 1975, affirming the judgment of conviction of Appellants, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, was certified for nonpublication and is not reported. Copies of the said opinion are attached hereto as Appendix A.

JURISDICTION

On June 20, 1973, Appellants and one Cawley were convicted of the crimes of forgery, conspiracy to commit forgery, and possession of a completed instrument with intent to defraud, in the Superior Court of the State of California in and for the County of San Mateo. On October 4, 1973, Notice of Appeal to the Court of Appeal of the State of California, First Appellate District, Division Four, was filed by Appellants. The judgment of the said Court of Appeal affirming Appellants' conviction was filed on January 13, 1975, and the order of the Supreme Court of the State of California denying a hearing in Appellants' case was filed on March 12, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

QUESTION PRESENTED

The question presented in this appeal is whether criminal defendants can constitutionally be denied the right to present relevant and material evidence of their innocence in the form of a tape recorded state-

ment incriminating a police informer because such tape recorded statement was obtained without the consent of the police informer in violation of California Penal Code Section 632 which prohibits the use in evidence of confidential telephone communications recorded without the consent of all parties to the communication.

STATUTES INVOLVED

California Penal Code Section 632 is set forth in Appendix C hereto.

STATEMENT

On January 12, 1973, Appellants were coroner's investigators employed by the Coroners Office of the County of San Mateo, State of California. On the said date, the body of one Samuel Yeary was found in Yeary's car in a parking lot in the City of South San Francisco in said County, Yeary having apparently died of a heart attack. Appellant Kindred and one Peter Durigan, an ambulance driver engaged in body removal, removed Yeary's body to the morgue. On January 16, 1973, a cashier's check payable to Samuel Yeary in the amount of $500.00 was deposited by an unknown person in the savings account of Appellant Scott, using Scott's passbook. The check had only a typewritten endorsement, and the teller who received the deposit could not recall the transaction or identify the depositor.

The principal witness for the prosecution was the ambulance driver, Peter Durigan. Durigan testified that some time after the Yeary body had been brought to the morgue, Appellant Kindred approached him in the parking area, showed him the $500.00 cashier's check which he said he had found on Yeary's body, and asked Durigan to cash the check by forging Yeary's endorsement. (Durigan had a prior criminal record for bad checks).

Durigan testified that he took the check home with him intending to cash it, but changed his mind when his wife disapproved. Durigan testified that he called Appellant Kindred and told him he could not cash the check, and that Appellant Kindred and Appellant Scott came to his home and picked up the check saying that Scott intended to cash it at the San Francisco Airport. Durigan further testified that Scott later told him he intended to deposit the check in his (Scott's) savings account.

Durigan testified that a couple of days later, at his wife's insistence, he called Inspector Smith of the San Mateo County District Attorney's Office and later went to the District Attorney's Office where he told the Inspector what had happened and at the Inspector's suggestion, made calls to Appellants Kindred and Scott. Inspector Smith allegedly tape recorded all of these telephone conversations, but the conversation with Appellant Scott was not recorded ostensibly due to a malfunction of the tape machine. According to Durigan and Inspector Smith, Appellant Scott was supposed to have told Durigan that he

had deposited the cashier's check in his savings account and that when he asked Scott if he had signed his name on the back of the check, Scott told him he had. It was conceded by the District Attorney and Inspector Smith that the reasons originally given to the grand jury for the malfunction of the tape recorder were false, and there was great dispute as to whether there had actually been a malfunction of the tape machine at all.

Durigan further testified that several days later he saw Appellant Scott at the County Hospital and Scott told him that he had deposited the check in his savings account and showed him the bank book with the deposit. Durigan then allegedly told Scott that he had informed on him and Appellant Kindred to the District Attorney's Office and further informed him about the recorded telephone messages. According to Durigan, Scott told him that he was going to say he had lost his book, and Scott then burned the passbook in Durigan's presence in the furnace at the County Hospital.

Durigan was severely impeached concerning his whereabouts on the day Yeary's body was found and also in regard to the fact that Appellant Kindred is supposed to have told him that the cashier's check had been found in Yeary's sock. A fingerprint expert called by the People testified that the check in question could never have been in contact with anyone's foot. Durigan further testified that he had not been prosecuted for his part in the offense and that he had testified before the grand jury that if he had

been indicted, he would have denied everything he had said concerning the case. Durigan admitted that he had free access to the office where the typewriter which had been used to endorse the Yeary check was located, and further testified that the purported verbatim transcript of the unrecorded Scott phone call introduced by the People was *not* a fair and accurate recounting of the conversation.

The various tape recordings between Durigan, Appellant Kindred and a co-defendant Cawley were admitted into evidence and played for the jury.

After laying a foundation that a later tape recording between Durigan and co-defendant Cawley made by Cawley the night Durigan testified before the grand jury was fair and accurate, the tape recording was offered by the defendants. The court ruled that the tape could not be admitted in evidence because it had been illegally recorded in violation of Section 630 of the California Penal Code since the recording had been made without the knowledge or permission of Durigan. The trial court refused even to hear defendant's offer of proof as to the contents of the tape recording. The court, however, did allow co-defendant Cawley to testify as to the substance of the conversation, and it was shown that the tape contained evidence that Durigan himself could have been the person who deposited the check in Appellant Scott's bank account. Durigan had testified that he was not acquainted with any of the tellers at the savings and loan in which the check was deposited, that he did not know the teller who had accepted the deposit, had never met her, and could

not even identify her. Defendant Cawley testified that during his tape recorded conversation, Durigan, although he was not supposed to know the teller, had recognized her as soon as she entered the hallway outside of the courtroom. Further efforts to introduce the tape recording were likewise denied by the court. Appellants objected that the trial court's action was a denial of constitutional due process of law.

Appellants and their co-defendant each testified in his own behalf, denying all of the charges. Appellant Scott admitted that he had received a telephone call from Peter Durigan and that Durigan had asked him if he had cashed a check. Appellant Scott told Durigan that he had either cashed or deposited the check and believed that Durigan had been referring to a check which Scott had received from flying ashes out to sea. Appellant Scott further testified that at the time the check was deposited in his account, he had been in another city with other persons. Scott further testified that the last time he had seen his savings passbook was the previous summer but that Durigan had access to his passbook as a visitor to his home and to his office.

Appellants and their co-defendant Cawley were convicted of forgery, conspiracy to commit forgery and possession of a completed check with intent to defraud. The District Court of Appeal of the State of California reversed the conviction as to defendant Cawley based upon various errors of the trial court, but refused to reverse the conviction as to Appellants. The District Court ignored the constitutional question

of due process which was raised in both the trial court and before the District Court by assignment of error (Reporter's Transcript 930-931; Appellants' Opening Brief pp. 33-35; Appellants' Reply Brief, pp. 5-8; Appellants' petition for hearing in California Supreme Court pp. 2-6), but impliedly upheld the constitutionality of Penal Code Section 632 by finding that the tape recording should have been admitted because it was not a confidential communication.

THE QUESTIONS ARE SUBSTANTIAL

As far as can be determined, this is the first case to come before the courts which deals with the constitutionality of a State law prohibiting a criminal defendant from introducing relevant, material evidence of his innocence because of the manner in which that evidence was procured and the first case to deal with the applicability of anti-wiretap statutes to criminal defendants. 18 U.S.C. §2511(d) is the Federal statute analogous to California Penal Code Section 632. This Section specifically exempts from the wire-tap statutes recordings made with consent of *one* party to the conversation. Apparently the difference between the Federal statute and the California statute are due to a recognition by Congress of the constitutional questions involved in prohibiting a criminal defendant from using telephone conversations recorded by him in evidence at his trial.

Tape recordings, of course, are not simply corroborative evidence, they are in themselves evidence.

Section 250 of the California Evidence Code makes them the best evidence of a conversation. If the California statute is constitutional, then criminal defendants are deprived of a powerful tool which the prosecution is free to use at will, (the California statute exempts law enforcement officers). In the instant case, the prosecution's tape recorded conversations of the informant and the Appellants were freely admitted into evidence while the Appellants' tape recordings which contain substantive evidence that the informant himself may have committed the crime were rejected as having been illegally obtained. No other case could be found in which evidence obtained by a private individual was denied admission because it was illegally obtained.

In *Rathbun v. United States* (1957) 335 U.S. 197, this court recognized that a person has a *right* to record his own telephone conversations. It is a denial of due process to allow the police to use in evidence tape recorded conversations with the consent of one party but to deny this right to the defendants, in a criminal action. In these days of electronic and other technological "miracles", the courts should require a strong showing before an individual can constitutionally be denied the right to use such technological advances in the gathering of evidence to support his criminal defense. While a restriction on such obviously pernicious activities as wire tapping is clearly reasonable, a restriction upon the ordinarily benign act of recording one's own telephone conversations should not be restricted, and such restriction is a denial of due process of the law under the Constitution of the

United States. The provisions of California Penal Code Section 632 which prevent a criminal defendant from using in evidence at his trial tape recordings of telephone calls made to him are invalid as repugnant to the due process provisions of the Constitution of the United States, and the convictions herein should be reversed.

Dated, Millbrae, California,
May 20, 1975.

CLARENCE B. KNIGHT,
Attorney for Appellants.

(Appendices Follow)

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

1 Crim. No. 12656
(Sup. Ct. No. C-3462)

People of the State of California,
Plaintiff and Respondent.
vs.
William Scott, Ronald Kindred and Robert Cawley,
Defendants and Appellants.

[Filed Jan 13, 1975]

OPINION

The Trial Court Did Not Err In Denying Appellants' Motion For a Severance

Appellants Scott and Cawley made motions before and during the trial for a separate trial, or in the alternative, for exclusion of incriminating statements made against them by prosecution witness Durigan and the codefendants. These statements were largely

contained in tape recorded conversations of Durigan and the coappellants.

The motions were based on *People v. Aranda,* 63 Cal.2d 518. Appellants argue that alternative (3),[1] as stated in *Aranda,* was not complied with; hence, the judgments against them must be reversed. A failure to adhere to the *Aranda* procedure constitutes reversible error only if it causes prejudice. (People v. Charles, 66 Cal.2d 330, 337.)

The basis on which the trial judge denied appellants' motion for severance was California Evidence Code section 1223 and cases decided thereunder. That section reads: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence. (Stats. 1965, c. 299, § 1223.)" The trial court felt that the extrajudicial statements made by the various appellants and Durigan which incriminated their codefendants fit within the language of Evidence Code

[1] "(3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible." (*Id.* at p. 531.)

section 1223. Where a conspiracy is charged and shown, a statement of one conspirator in furtherance of the conspiracy is admissible against the other, whether the trial is joint or separate. Hence, the *Aranda* requirement of deletion does not apply. (People v. Gant, 252 Cal.App.2d 101, 111; People v. Morales, 263 Cal.App.2d 368, 374; People v. Brawley, 1 Cal.3d 277, 286.)

It is obvious from the foregoing that before Evidence Code section 1223 is applicable (and *Aranda* inapplicable) the explicit foundational grounds of the statute must be met. Thus, the extrajudicial statement must be (a) made by the declarant while participating in the conspiracy, and in furtherance of the objective of the consipracy *and* (b) the statement must have been made prior to or during the time that the one against whom it is offered was participating in that conspiracy *and* (c) the evidence is offered after a prima facie showing of the conspiracy's existence or subject to the admission of such evidence. Appellants seek to show that the above requirements were not met; therefore, they argue that their motions for severance should have been granted.

In order to facilitate the analysis which follows, the particular hearsay statements involved will be broken down into sub-groups.

The Pre-January 16 Conversations of Appellants Scott and Kindred With Prosecution Witness Durigan Were Not Admitted Against Appellant Cawley. The Trial Judge's Actions Were Not In Error.

An objection was made on behalf of defendant Cawley to the introduction, against him, of evidence of conversations testified to by Durigan between Durigan and appellants Kindred and Scott. The basis for this objectioin was that when the conversations between the above-named individuals occurred,[2] appellant Cawley was not connected with the alleged conspiracy. Since they were made out of the presence of Cawley and before he had any connection with the conspiracy, they would not be admissible against him.

The trial court sustained the objection and granted appellant Cawley's motion to strike a portion of the previous testimony relating to a conversation between Durigan and appellant Kindred at the hospital. The court understood that Cawley's objection was a continuing one; until such time as there was evidence of a conspiracy involving Cawley, statements of Durigan or appellants Kindred and Scott would not be admissible against him.

Appellant Cawley argues that the court's failure to further admonish the jury not to consider, as evidence against him, what transpired between Durigan, Kindred and Scott before there was any evidence of Cawley's involvement in the conspiracy was reversible

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[2]These conversations allegedly occurred on January 12. Durigan's first contact with Cawley was not until two days later.

error. Indeed, he implies that the court's failure to do so was tantamount to admitting such evidence against Cawley—evidence which the court explicitly ruled was "irrelevant as to Defendant Cawley up till such point as there may be some evidence of any conspiracy of all three defendants."

Appellant Cawley lays undue emphasis on the giving of CALJIC 6.11; undue especially in light of a lengthy series of other instructions which adequately protected his right not to have the objectionable evidence considered against him. Thus, he fails to acknowledge the trial court's instruction that: "Evidence has been admitted as against one [or more] of the defendants, but denied admission as against the other [others].

"At the time this evidence was admitted you were admonished that it could not be considered by you as against the other defendant[s].

"You are again instructed that you must not consider such evidence as against the other defendant[s].

"Your verdict as to each defendant must be rendered as if he were being tried separately."

Indeed, a review of the record on appeal clearly indicates that the jury was adequately instructed on the effect to be given to statements made by Durigan and Cawley's codefendants before such time as evidence indicated Cawley's alleged joining of the conspiracy. The jury was told that "Evidence of any acts or declarations of other conspirators prior to the time such person becomes a member of the conspiracy may

be considered by you in determining the nature, objectives and purposes of the conspiracy, *but for no other purpose.*" A series of instructions on the very points Cawley now objects to were given. Taken together, there is not sufficient evidence on the record to indicate that any prejudice resulted to appellant Cawley from the court's supposed error. The jury was properly advised of the inadmissibility against Cawley of the conversations of Durigan, Scott and Kindred.

The Declarations of Cawley and Kindred Were Properly Introduced Against Appellant Scott; Similarly, the Declarations of Scott and Kindred Made on January 16, 1973 Were Properly Admitted Against Appellant Cawley

Appellants Scott and Cawley challenged the propriety of the trial court's allowing into evidence incriminating statements made by Durigan and by the respective codefendants as against each other. They argue that *People v. Aranda, supra,* 63 Cal.2d 518, required a severance of their trials before such statements could properly be admitted.

People v. Brawley, 1 Cal.3d 277 at 286, states that "[t]he *Aranda* rules, however, have been held inapplicable if the extrajudicial statements come within the coconspirators' exception to the hearsay rule. (People v. Morales, 263 Cal.App.2d 368, 374 . . . ; People v. Gant, 252 Cal.App.2d 101, 111 . . . ; see In re Domingo, 268 Cal.App.2d 642, 650. . . .)" Thus, the correctness of the trial court's ruling depends upon whether the requisites of Evidence Code section 1223 were satisfied.

Both appellants Cawley and Scott urge that the conspiracy charged in the indictment ended when the check was forged and deposited in the bank. This occurred between 10:00 and 10:30 a.m., January 16, 1973. Cawley and Scott argue that since the telephone conversations between Durigan and the various appellants did not occur until that afternoon, they were not during the conspiracy and thus were not within the coconspirators' exception to the hearsay rule.

This argument must fail. The termination point of any particular conspiracy is a question of fact for the trier of fact. (People v. Smith, 63 Cal.2d 779, 794.) The recent California Supreme Court decision of *People v. Saling,* 7 Cal.3d 844, 852, stated the rule: "It is for the trier of fact—considering the unique circumstances and the nature and purpose of the conspiracy of each case—to determine precisely when the conspiracy has ended. (Citations.) Particular circumstances may well disclose a situation where the conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy. (Citations.)"

The conspiracy in the instant case contemplated more than depositing a forged check; it embraced the subsequent removal of the proceeds of the check and the dividing of the money. This was not accomplished when the damaging telephone calls were made. As stated in *People v. Ross,* 46 Cal.App.2d 385, 396, "[i]t has been held that when a conspiracy discloses an agreement and intention to divide the stolen property, as it does in the present case, evidence of the acts,

conduct and declarations of the conspirators subsequent to the actual theft, may be admitted in evidence on the theory that the conspiracy is not completed until the spoils are divided." Thus, the jury could properly find that the conspiracy had not ended as of the afternoon of January 16, 1973. The overt acts which are averred and proved may properly serve as a basis for extending the scope of the conspiracy. (Fiswick v. United States, 329 U.S. 211.) The statements were properly found to have been made during the conspiracy.

Furthermore, the statements made by appellants Cawley and Kindred were in furtherance of the conspiracy, and were properly admitted against appellant Scott. Similarly, the statements of Scott and Kindred were properly admitted against appellant Cawley.

Appellant Cawley characterizes the statements as "solely part of a subsequent investigation by a law enforcement agency . . . therefore admissible only against the persons making the statements, and not any of the other alleged conspirators." Such a characterization is not supported by the record.

As noted by respondent, the thrust of the recorded conversations was to discuss the splitting of the money; how it would be accomplished and fears about the arrangement. As ruled above, the conspiracy was not merely to forge a check, but was to divide the proceeds of that check. Conversations which tend to inform conspiracy members of the arrangement so that they may guide their conduct accordingly are in

furtherance of the conspiracy. (People v. Saling, *supra,* 7 Cal.3d at p. 852, fn. 8.) The statements of Cawley, Scott and Kindred were in furtherance of the conspiracy.

The Extrajudicial Statements of Peter Durigan.

While appellants Cawley, Scott and Kindred were conspirators on January 16, 1973, when the Durigan calls were made, there can be no doubt that Durigan's statements did not meet the requirements of Evidence Code section 1223 and would not be admissible under that code section. The Durigan statements were neither in furtherance of the conspiracy, nor made while he was participating in the conspiracy.

All of the telephone calls of January 16 were made by Durigan at the behest and under the supervision of the district attorney's investigator. Durigan was effectively in custody when he made the calls.

"Statements of one conspirator are admissible against all the others only because there is deemed to exist among conspirators a community of interest that makes each conspirator an 'agent' of the others. In the case of a government agent posing as a conspirator, the community of interest ceases to exist, and with it, the basis for admitting the agent's statements." (United States v. Wilkerson, 469 F.2d 963, 968.)

An examination of the transcripts of the recordings indicates that many of the incriminating statements therein contained were uttered by Durigan. His statements were particularly damaging to appellant Scott.

The prosecution argues that any error the trial court may have made in admitting Durigan's statements were harmless. The basis for this contention is the fact that Durigan testified at trial to much the same effect as the language contained in the tapes. Consequently, the defense was afforded an ample opportunity to cross-examine Durigan about the content of his statements on the tapes.

As to appellant Scott, the trial court's erroneous admission of Durigan's extrajudicial statements was not prejudicial so as to require a reversal. The record reveals substantial independent evidence of his complicity in the matter. Durigan testified at trial as to the substance of his conversation with Scott. The "transcript" of that unrecorded call was admitted into evidence. The admissions by Scott contained in that call were merely repeated in the subsequent conversations Durigan had with Cawley and Kindred. Although the recording of the Scott-Durigan call failed, Inspector Smith and Durigan himself testified as to its contents, though the latter testified that the "transcription" by Smith was unfaithful. He did not, however, say in what way it was unfaithful, and Durigan's testimony in court contained the most damaging admissions of Scott.

"Durigan: I asked him if he still had the check. Prosecutor: . . . What did he say . . . Durigan: He told me at that time that he had deposited it in his savings account. (Later) Prosecutor: Was there any conversation about the disposition of the $500 or the split? Durigan: He said he would leave it in his savings

account about a week, give it time to clear Dayton, Ohio, and then he would draw it out and get in touch with us."

Furthermore, the check was deposited in Scott's account by someone who had the passbook. In view of the substantial evidence supporting the verdict as to Scott, it was not reasonably probable that a result more favorable to appellant Scott would have been reached had the Durigan statements been deleted. (People v. Watson, 46 Cal.2d 818 at pp. 836-837.) Also, as to appellant Kindred, there is substantial evidence to support the verdict and it is not reasonably probable that a result more favorable to Kindred would have been reached had the tapes not been admitted.

Durigan testified that when he told Cawley about the check and the plan to cash it on January 14,[3] that Cawley did not believe him. There was no indication that Cawley had any prior knowledge of the check. In fact, after informing Cawley, Durigan thereafter called appellant Kindred. When Durigan told him of having mentioned the story to Cawley, Kindred became upset.

Thereafter, Cawley conducted an investigation to ascertain the truth of the Durigan tale. He asked Kindred about the check, and the latter showed him $200 and $300 cashiers' checks which were found on the Yeary body and which were properly logged in the coroner's records. Believing these to be the $500

[3]Cawley testified that it was on the 13th.

cashiers' checks which Durigan told him about, Cawley was satisfied that no irregularities had occurred. The record shows no other evidence of Cawley's involvement until the phone calls of January 16, 1973.

Durigan's inadmissible hearsay was improperly admitted against the appellants as noted, *supra*. As to appellant Scott, the error was not substantial. However, in the case of appellant Cawley, against whom the prosecution's case was quite weak, the same cannot be said. "The rule is frequently declared that, in a 'close case,' i.e., one in which the evidence is 'evenly balanced' or 'sharply conflicting' a lesser showing of error will justify reversal than where the evidence strongly proponderates against the defendant." (Witkin, California Criminal Procedure, Reversible Error, § 755, p. 728.)

The potential unfairness inherent in every conspiracy trial (Krulewitch v. United States, 336 U.S. 440, 445 (concurring opinion of Jackson, J.)), is such that a weak case against one defendant will often be strengthened by a mass of evidence relevant to his codefendants. (Castro v. Superior Court, 9 Cal.App. 3d 675, 692.) For this reason, the courts must be especially zealous of protecting the rights of defendants. Errors which may normally not be prejudicial have a tendency to become so. Given the fact that the prosecution tried the case on the theory that Durigan was a coconspirator and that the jury was instructed pursuant to CALJIC 6.11 and 6.20, the erroneous admission of Durigan's statements against appellant Cawley was reversible error. (People v. Watson, *supra,* 46 Cal.2d at 834.) In the absence of Durigan's statements,

there is a reasonable probability that Cawley would have been acquitted of the conspiracy charge, as he actually was of the other charges against him.

The Trail Court's Failure to Instruct the Jury on the Termination of the Conspiracy was Harmless Error

The foregoing discussion also settles appellant Scott's contention that the trial court failed to give proper instructions regarding the termination of the conspiracy. Even assuming there was error, the only possible prejudicial effect was to allow the jury to consider Durigan's hearsay statements as contained on the tapes. The court's giving of CALJIC 6.20 as to voluntary withdrawals should have been supplemented with regard to Durigan. His act of going to the authorities did terminate his part in the conspiracy. (Fiswick v. United States, *supra,* 329 U.S. 211; People v. Roberts, 40 Cal.2d 483, 489.) However, the error does not require reversal; it could not reasonably have affected the verdict against appellant Scott.

The Tape Recorded Conversation on February 22, 1973

The trial court committed error in excluding the tape recording of the telephone conversation between Durigan and Cawley made on February 22, 1973.

All appellants attack the trial court's denial of admission into evidence[4] of a tape recorded conversation

[4]The trial court would not even entertain an offer of proof on the contents of the tape recording.

between prosecution witness Durigan and appellant Cawley. The conversation occurred on February 22, 1973, prior to or during the time that the grand jury which indicted the defendants was meeting.

Penal Code section 632 reads in pertinent part:

"(a) Prohibited acts, punishment; recidivists. Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 631 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

"(b) Person. The term 'person' includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or

subdivision thereof, whether federal, state or local, but excludes an individual know by all parties to a confidential communication to be overhearing or recording such communication.

"(c) Confidential communication. The term 'confidential communication' includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

"(d) Evidence. Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding."

Penal Code section 633 largely exempts law enforcement officials from the prohibitions of section 632. Thus, participant monitoring under the auspices of the Attorney General, any district attorney, assistant district attorney, etc.[5] may lawfully be conducted.

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[5]Section 633 states: "Nothing in Section 631 or 632 shall be construed as prohibiting the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, or any officer of the California Highway Patrol, or any chief of police, assistant chief of police, or policeman of a city or city and county, or any sheriff, under

Constitutional limitations are, of course, still applicable to the conduct of these officials.

It can be seen from a reading of section 632 that only confidential communications are protected by the statute. Subsection (c) defines confidential communication to include "any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties . . ." The salient inquiry is thus whether or not the circumstances under which the conversations were made reasonably indicated to Peter Durigan that it would be confined to himself and appellant Cawley, the recipient of the call.

Durigan's use of a public telephone was an indication of his expectation of confidentiality. (People v. Canard, 257 Cal.App.2d 444, 463-465.)[6] Further, the statute itself speaks in terms of "circumstances" which imply an evaluation predicated on all relevant considerations. Mr. Durigan was making a call from a public telephone to a private number (Mr. Cawley's) to allegedly inform Cawley about certain mat-

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sheriff, or deputy sheriff regularly employed and paid as such of a county, or any person acting pursuant to the direction of one of the above-named law enforcement officers acting within the scope of his authority, from overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter.

"Nothing in Section 631 or 632 shall be construed as rendering inadmissible any evidence obtained by the above-named persons by means of overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter."

[6]While the *Canard* case interprets Penal Code section 653(j), which was repealed in 1967, that section was replaced with the present section 632. The wording of the statutes is identical with regard to defining "confidential."

ters which the prosecutor's investigator clearly did not desire him to reveal to anyone, least of all the defendants.

On the other hand, there is evidence in the record which suggests that Durigan desired appellant Cawley to inform his codefendants of the contents of the call. If such was the case, the proscription of Penal Code section 632(d) would be inapposite because the communication would not be a confidential one.[7]

The record shows that Durigan and all the appellants were good friends. Appellants Kindred and Scott had contemplated going into business with Durigan. More significantly, Durigan had previously told appellant Scott that he (Durigan) had gone to the district attorney's office and made damaging revelations about the check. He chronicled the extent of these revelations in great detail. This was obviously in breach of the confidence which Inspector Smith placed in Durigan and clearly shows that Durigan was somehow trying to aid the friends whom he had previously incriminated. Why then, on a second occasion (the evening of February 22, 1973), should Durigan have desired the revelations he made to appellant Cawley be confined only to Cawley? After all, Durigan was good friends with *all* the appellants and had previously made even more significant disclosures to Scott.

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[7]"The term 'confidential communication' includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties . . ." (Pen. Code, § 632(c).)

The trial court's denial of appellant's offer of proof on the tape and its refusal to listen to the tape was erroneous given the circumstances of this case. Even though the standard of section 632(c)[8] is not a stringent one, appellants were denied an opportunity to adequately show non-confidentiality by the trial court's action. The tape itself may have solved the close issues on its confidentiality.

A finding of error on this ground does not, however require reversal unless there is a reasonable probability that a result more favorable to the appellants would have been reached in the absence of the erroneous exclusion. (Cal. Const., art. VI, § 13; People v. Watson, *supra,* 46 Cal.2d 818, 836-837.)

The testimony on the tape included some inadmissible opinions that would have to be excluded. The other testimony on the tape would at the most constitute impeachment of some of Durigan's and possibly Smith's testimony on collateral matters. An inference might be drawn from the tape that Durigan deposited the check at the bank, in that he mentioned that he recognized the bank teller who received the deposit of the check. He had previously stated that he did not know her.

Cawley, however, was permitted to testify as to the contents of the tape so that the tape itself would merely be corroborating evidence of the conversation. There is no question that the tape would be much stronger evidence of the conversation than Cawley's

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[8] ". . . as may reasonably indicate that any party to such communication desires it to be confined to such parties . . ."

testimony in court, but even if the jury accepted as true every word of the tape, there is nothing in it that goes to the guilt or innocence of the appellants. If the tape had actually contained material evidence in support of appellants' position then the exclusion of the tape might constitute reversible error.

Appellant Cawley's Motion In Arrest Of Judgment Was Properly Denied

"A motion in arrest of judgment . . . may be founded on any of the defects in the accusatory pleading mentioned in Section 1004, unless the objection has been waived by a failure to demur . . ." (Pen. Code, § 1185.) Defects in the form of the pleading must first be urged by demurrer. The theory is that the motion is not an alternative but a supplementary remedy, and the defendant should urge these defects at the first stage, thus giving the court an opportunity to direct a corrective amendment. If no demurrer is filed these defects are waived. (Witkin, Cal. Crim. Proc., Judgment and Attack In Trial Court, § 603, pp. 596-597; Pen. Code, §§ 1012, 1185.)

As noted by respondents, there is nothing in the Clerk's Transcript on appeal which indicates appellant Cawley demurred to the indictment on any of the enumerated grounds in Penal Code section 1004. Cawley's motion to set aside the indictment pursuant to Penal Code section 995 was directed at the quantum of evidence advanced in support of the indictment—not to any facial insufficiency of the indictment.

Two exceptions to the waiver rule are stated in Penal Code section 1012: (1) "objection to the jurisdiction of the court," and (2) "objection that the facts stated do not constitute a public offense." As to the latter, appellant Cawley may properly raise this ground without having made a prior demurrer. However, his contention that "conspiracy . . . is a criminal offense so vague and uncertain that men of common intelligence must guess at its meaning" is without merit.

The constitutionality of Penal Code section 182 (conspiracy) is well settled. (Lorenson v. Superior Court, 35 Cal.2d 49; People v. Henderson, 120 Cal. App.2d 50; People v. Koch, 4 Cal.App.3d 270.) Conspiracy is a public offense.

Finally, appellant Cawley's argument that the prosecution charged one conspiracy in the indictment and in the course of the trial proved a broader one, must be rejected.

The judgment is reversed as to appellant Cawley. In all other respects the judgments are affirmed.

Caldecott, P. J.

We concur:

Rattigan, J.

Christian, J.

Appendix B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

March 12, 1975

I have this day filed Order—Hearing Denied

In re: 1 Crim. No. 12656

People

vs.

Scott, et al.

Respectfully,

G. E. Bishel
Clerk

Appendix C

CALIFORNIA PENAL CODE

§ 632. Eavesdropping on or recording confidential communications

(a) **Prohibited acts; punishment; recidivists.** Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 631 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

(b) **Person.** The term "person" includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government

or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication.

(c) **Confidential communication.** The term "confidential communication" includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) **Evidence.** Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(e) **Exceptions.** This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic com-

munication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) **Hearing aids.** This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

Appendix D

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In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

No. 12656 (Criminal)

The People of the State of California,
Plaintiff and Respondent,
vs.
William Scott and Ronald Kindred,
Defendants and Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William Scott and Ronald Kindred, the Appellants above named, hereby appeal to the Supreme Court of the United States from

the final order of the District Court of Appeal of the State of California, affirming the judgment of conviction entered herein on January 13, 1975, and from the final order of the Supreme Court of the State of California, denying a hearing in the within matter entered on March 12, 1975.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Dated: May 6, 1975.

/s/ Clarence B. Knight
Clarence B. Knight

Received May 7, 1975
Court of Appeal
First Appellate District